

ORIGINAL

NO. 84-501

3

Supreme Court, U.S.
FILED

OCT 26 1984

ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

BARRY MINTZES,

Petitioner,

-vs-

NEALY BUCHANON,

Respondent.

On Writ of Certiorari To The United States
Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK D. EAMAN
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(Admission to the Bar of
this Court Pending)

2090

RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

WHERE THE RESPONDENT PRESENTED TO FEDERAL COURT A HABEAS CORPUS PETITION ASKING VACATION OF HIS 23 YEAR OLD CONVICTION OF MURDER IN THE FIRST DEGREE BECAUSE HE WAS NOT AFFORDED THE ASSISTANCE OF COUNSEL AT THE TIME OF HIS CONVICTION, WHERE FULL TRANSCRIPTS OF ALL STATE COURT PROCEEDINGS EXIST, WHERE THE TRIAL JUDGE AND THE RESPONDENT RETAINED MEMORY OF THE COURT PROCEEDINGS, AND WHERE THE STATE DOES NOT DISPUTE THAT RESPONDENT WAS DENIED THE ASSISTANCE OF COUNSEL, DOES RULE 9(a) OF 28 USC FOLL. §2254 BAR RELIEF TO THE RESPONDENT?

II.

WAS A HEARING HELD BY THE STATE COURT TO DETERMINE WHETHER THE RESPONDENT WOULD BE FOUND GUILTY OF MURDER IN THE FIRST DEGREE OR MURDER IN THE SECOND DEGREE AND TO DETERMINE THE RESPONDENT'S PUNISHMENT A SEPARATE, CRITICAL STAGE OF THE STATE COURT PROCEEDINGS WHICH REQUIRED THE COURT TO AFFORD THE ASSISTANCE OF COUNSEL TO RESPONDENT OR SECURE A WAIVER OF COUNSEL FROM RESPONDENT.

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RESPONDENT'S COUNSELLESS CONVICTION OF MURDER IN THE FIRST DEGREE WAS NOT A UNITARY PROCEEDING; THE DEGREE HEARING WHICH FOLLOWED THE RESPONDENT'S PLEA TO AN OPEN CHARGE OF MURDER WAS A CRITICAL STAGE OF THE PROCEEDINGS AT WHICH WITNESSES TESTIFIED AND THE OUTCOME OF WHICH DETERMINED THE DIFFERENCE IN RESPONDENT'S SENTENCE; RESPONDENT SHOULD HAVE BEEN AFFORDED COUNSEL AT THAT STAGE OF THE PROCEEDINGS OR EXPLICITLY WAIVED COUNSEL.

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ADDITIONAL STATUTES INVOLVED

MCLA 750.316, MSA 28.548

Sec. 316. FIRST DEGREE MURDER -- All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.

MCLA 750.317, MSA 28.549

Sec. 317. SECOND DEGREE MURDER -- All other kinds of murder shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.

STATEMENT OF THE CASE

In addition to facts stated by the Petitioner in his Petition for Writ of Certiorari, the Respondent would add the following facts to the Court's record.

For purposes of review of these proceedings, a full transcript exists of all state court proceedings, including the Respondent's arraignment and waiver of preliminary examination in state district court, Respondent's arraignment and plea of guilty in state circuit court, and Respondent's hearing in state circuit

court to determine his degree of guilt on the open charge of murder (Petitioner's Appendix 51a, 55a; Respondent's Appendix 1a.) As the transcripts of all proceedings reveal, at no time was the Respondent afforded the assistance of counsel. As the transcripts further reveal, the time between Respondent's counselless confession to law enforcement authorities (5:24 P.M., October 18, 1956) and Respondent's counselless sentence to life in prison without parole (12:30 A.M., October 19, 1956) was a period of less than 24 hours. (Petitioner's Appendix 69a, 104a)

The Respondent's plea of guilty without counsel to an open charge of murder was a brief proceeding which commenced at 9:30 A.M., October 19, 1956. During those proceedings the state judge had the following colloquy with the prosecutor regarding the setting of a time to take testimony to determine the Respondent's degree of guilt.

THE COURT: Let the record show that the court has conferred with the accused relative to the circumstances in each one of these crimes, is convinced that he committed the crimes, and that his plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress and without promise of leniency. Therefore his pleas are accepted and he is remanded to the custody of the county sheriff to await the taking of testimony of witnesses to determine the degree of the crime, and for sentence.

MR. CHAMBERLAIN: Shall we set that time now, your honor?

THE COURT: Yes.

MR. CHAMBERLAIN: May it please the court, I should like to state that we are hoping to be able to proceed as far as the prosecution is concerned by 11 o'clock this morning.

THE COURT: Very well; let me check with the assignment clerk.

(Petitioner's Appendix 53a)

¹ The purpose of the "degree hearing" was to determine whether Respondent would be found guilty of murder in the first degree or murder in the second degree; the penalty for murder in the first degree in the State of Michigan was mandatory life without

parole; the penalty for murder in the second degree was any term of years up to life. MCLA 750.316; MSA 28.548. MCLA 750.317; MSA 28.549. The record is clear that Respondent was not afforded the assistance of counsel, did not waive counsel, and did not question witnesses or participate in any way his degree hearing. (Petitioner's Appendixes 55a-104a)

The Federal District Court held an Evidentiary Hearing in this matter at which the state trial judge testified as to his recollection of the court proceedings and the Respondent testified as to his recollection of the court proceedings (Petitioner's Appendix 42a-43a). At the Evidentiary Hearing in the District Court, Respondent, a black man charged with the murder of two white people in a rural Michigan county, testified that the atmosphere surrounding his arrest and detention in the rural community of Stockbridge included a mob outside the jail peering through the windows of the jail at him; newspaper clippings of the day were introduced at the Evidentiary Hearing showing that additional deputies had to be called for crowd control; the state trial judge stated he was unaware of this mob atmosphere. (Petitioner's Appendix 37a, 42a, 43a, 41a)

REASONS FOR NOT GRANTING THE WRIT

I.

THIS CASE, WHERE IT IS UNDISPUTED THAT THE RESPONDENT HAS BEEN IMPRISONED AS A RESULT OF COUNSELLESS PROCEEDINGS, WHERE FULL TRANSCRIPTS EXIST OF ALL STATE COURT PROCEEDINGS, AND WHERE THE TRIAL JUDGE AND THE RESPONDENT RETAINED MEMORY OF THE PROCEEDINGS AND TESTIFIED IN FEDERAL DISTRICT COURT, IS AN INAPPROPRIATE CASE TO REVIEW THE APPLICATION OF LACHES OR RULES EMBODIED IN 28 USC FOLL. §2254.

² Judge Wellford, in his Opinion in the United States Court of Appeals for the Sixth Circuit in this case, noted that at the Respondent's degree hearing, there was nothing in the transcript that indicated any mention of right to counsel or any knowing

waiver of right to counsel for the purposes of the degree hearing or sentencing. (Petitioner's Appendix 17a). Accordingly, he wrote that there was a sufficient record of the proceedings to indicate that the state had not been prejudiced in its ability to respond to the Respondent's claims which attacked his conviction of murder in the first degree based on a counselless degree hearing. Judge Contie of the United States Court of Appeals for the Sixth Circuit, in his Opinion in this case, agreed with Judge Wellford that 18 U.S.C. §2254, Foll. Rule 9(a) did not bar consideration of the claim that the Respondent did not waive his right to counsel at the degree and sentencing hearing; Judge Contie also believed that the state had not demonstrated prejudice in several other claims and did not find them barred by Rule 9(a). (Petitioner's Appendix 17a-18a)

There is no dispute that Respondent was not afforded the right to counsel at any stage of his proceedings; there is no dispute that Respondent was not asked whether or not he waived counsel for purposes of his degree hearing which determined whether he would be guilty of murder in the first degree or murder in the second degree. At no time has the state claimed any actual prejudice in responding to claims of a counselless conviction in this case. The state wishes this court to focus merely on the length of delay and the fact that some witnesses are now deceased or cannot remember the events of these proceedings. However, given the existence of a full transcript and the availability of the trial judge as a witness, the decision of the Court of Appeals for the Sixth Circuit that the state was not prejudiced in its response to Respondent's claims that his conviction was invalid because of the absence of counsel and the absence of waiver of counsel was clearly correct and this case presents no significant question which should be reviewed by this Court.

Indeed, the Sixth Circuit has applied Rule 9(a) to cases involving a long delay where the transcript of the proceedings

has been lost and cannot be located. Arnold v Marshall, 657 F2d 83 (6th Cir., 1961).

Conversely, the existence of a transcript and a trial record has not barred a decision on the merits of a petitioner's claim even after a long delay. Henagan v Anderson, 500 F Supp 671 (D.C.Mich., 1980) (13 year delay did not bar determination of ineffective assistance of counsel claim from the trial record); Neal v Wainwright, 512 F Supp 92 (D.C. Fla, 1981) (12 year delay did not bar habeas corpus relief where transcript preserved discussion between petitioner and his counsel which formed the basis of petitioner's claim.)

In this case the state was not only unable to demonstrate prejudice in responding to the claims of the Respondent, the state was able to meet this claim on the merits and to successfully prove to the District Court and to the United States Court of Appeals for the Sixth Circuit that some of the Respondent's claims were without merit. (Petitioner's Appendix 1a-23a, 24a-32a)

II.

RESPONDENT'S COUNSELLESS CONVICTION OF MURDER IN THE FIRST DEGREE WAS NOT A UNITARY PROCEEDING; THE DEGREE HEARING WHICH FOLLOWED THE RESPONDENT'S PLEA TO AN OPEN CHARGE OF MURDER WAS A CRITICAL STAGE OF THE PROCEEDINGS AT WHICH WITNESSES TESTIFIED AND THE OUTCOME OF WHICH DETERMINED THE DIFFERENCE IN RESPONDENT'S SENTENCE; RESPONDENT SHOULD HAVE BEEN AFFORDED COUNSEL AT THAT STAGE OF THE PROCEEDINGS OR EXPLICITLY WAIVED COUNSEL.

Judge Wellford of the United States Court of Appeals for the Sixth Circuit, in his Opinion allowing habeas corpus relief to the Respondent, stated:

There is, first of all, no question but that this hearing on the determination of the degree of guilt was a critical stage and bore directly on the punishment and/or disposition which was to be made by the state court after acceptance of

the guilty plea. The right to counsel was a matter of 'supreme importance' at this stage of the proceeding. (Petitioner's Appendix 15a-16a)

Judge Contie of the United States Court of Appeals for the Sixth Circuit agreed with Judge Wellford (Petitioner's Appendix 17a).

Indeed, the United States Supreme Court has recognized the significance of a "degree hearing" in Michigan. In Moore v Michigan, 355 U.S. 155, 160 (1957), Mr. Justice Brennan, in discussing degree hearings in Michigan, stated:

. . . [T]he proceedings to determine the degree of murder, the outcome of which determined the extent of punishment, introduced their own complexities. With the aid of counsel, the petitioner, who as we have said neither testified himself in the proceedings nor cross-examined the prosecution's witnesses, might have done much to establish a lesser degree of the substantive crime, or to establish facts and make argument which would have mitigated the sentence. The right to counsel is not a right confined to representation during the trial on the merits.

Judge Wellford and Contie of the United States Court of Appeals for the Sixth Circuit relied upon Moore in their ruling that the degree hearing was a significant stage, and Judge Wellford noted that Moore held that the right to counsel was a matter of "supreme importance" at the degree hearing. 355 U.S. at 164.

It is clear that at no time was Respondent afforded the right to counsel at this hearing or was he asked whether he waived counsel for purpose of this hearing. It is further clear that these were not unitary proceedings but bifurcated proceedings involving a plea and a subsequent court hearing. As the trial judge said at the time of the plea:

THE COURT: Let the record show that the court has conferred with the accused relative to the circumstances in each one of these crimes, is convinced that he committed the crimes, and that his plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress and without promise of leniency. Therefore

his pleas are accepted and he is remanded to the custody of the county sheriff to await the taking of testimony of witnesses to determine the degree of the crime, and for sentence.

MR. CHAMBERLAIN: Shall we set that time now, your honor?

THE COURT: Yes.

MR. CHAMBERLAIN: May it please the court, I should like to state that we are hoping to be able to proceed as far as the prosecution is concerned by 11 o'clock this morning.

THE COURT: Very well; let me check with the assignment clerk.

The degree hearing involved the testimony of four witnesses presented by the prosecutor and the introduction of six exhibits (Petitioner's Appendix 56a). At no time was Respondent afforded any opportunity to participate in the degree hearing, with or without counsel (Petitioner's Appendix 55a-106a). At the conclusion of the degree hearing, Respondent was sentenced, without counsel, to life in prison (Petitioner's Appendix 106a).

A plea to an open charge of murder in a subsequent judicial proceeding known as a "degree hearing" has been established by Michigan Criminal Procedure. A Michigan statute (MCLA 750.318; MSA 28.550) provides for the determination of the degree of murder where a person is convicted "by confession" to the court:

The jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain their verdict, whether it be murder of the first or second degree; but, if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly. All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk.

The Michigan Supreme Court, in interpretation of the statute which provides for a degree hearing, has made certain findings. First of all, the examination of witnesses is mandatory, and the failure to conduct the examination in open court deprives a court of jurisdiction to accept the plea. People v Martin, 316 Mich.

669, 672, 673, 32 N.W. 2d 669 (1947); People v Machus, 321 Mich. 353, 32 N.W. 2d 480 (1948). Also, a witness in a degree hearing is one who, under oath gives his own knowledge of facts at issue in an open courtroom. People v Martin, supra. Failure to conduct a degree hearing is not a simple error of procedure but involves a deprivation of "an essential right, the observance of which is made mandatory by statute." People v Martin, supra.

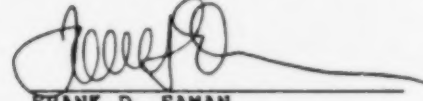
Under Michigan law and procedure, the degree of murder of which a defendant is found guilty is critical to his sentence. MCLA 750.316; MSA 28.548 provides that the punishment for a conviction of murder in the first degree shall be "solitary confinement or hard labor in the state prison for life." The crime of second degree murder (MCLA 750.317; MSA 28.549) is "imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same." The distinction in life sentences under the statute has been that for first degree murder, a person serves natural life without eligibility for parole, but under a life sentence for second degree murder a person can be eligible for parole after serving ten (10) years of his sentence. Richardson v Hatch, 134 F.Supp. 110 (D.C. Mich. 1955). The sentence of mandatory life for first degree murder has been held not to constitute cruel and unusual punishment in Michigan. People v Smith, 108 Mich. App. 338, 310 N.W. 2d 235 (1981).

Indeed, since the degree hearing involves a sentencing determination of the criminal defendant, it is obviously a critical stage of the proceedings which requires counsel. Mempa v Rhay, 389 U.S. 128 (1967). The United States Court of Appeals for the Seventh Circuit has also recognized that where Defendant validly waived counsel at the time of his plea, a subsequent sentencing proceeding was infirm where there was no counsel present at sentencing and no separate waiver of counsel at sentencing proceeding. Schell v United States, 423 F.2d 101 (7th Cir., 1970).

RELIEF

WHEREFORE, the Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,


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(313) 963-1610
(Admission to the Bar of
this Court Pending)

Dated: October 24, 1984

APPENDIX

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1. Arraignment and Waiver of Preliminary Examination
in State District Court Held October 18, 1956..... 1a

EDITOR'S NOTE

PAGES 1a-1d WERE POOR
HARD COPY AT THE TIME OF FILMING.
IF AND WHEN A BETTER COPY CAN BE
OBTAINED, A NEW FICHE WILL BE
ISSUED.

STATE OF MICHIGAN
IN THE JUSTICE COURT FOR THE CITY OF MASON

THE PEOPLE OF THE
STATE OF MICHIGAN

VS.

NEALY BUCHANON,

Respondent.

Proceedings had upon the Arraignment in the above-
entitled cause before the Hon. Roy W. Adams, Justice of the
Peace for the City of Mason, at Mason, Michigan on Thursday,
October 18, 1956, at 8 p. m.

PRESENT:

CHARLES E. CHAMBERLAIN, Esq., Prosecuting Attorney
in and for the County of Ingham,
Representing the People.

PAUL SKARSTAD
OFFICIAL COURT REPORTER
THIRTIETH JUDICIAL CIRCUIT

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THE COURT: Have you explained Mr. Buchanan's rights to him in this hearing?

MR. CHAMBERLAIN: No, not in this one, your honor.

THE COURT: You are Neely Buchanan?

THE RESPONDENT: Yes, sir.

THE COURT: I have a complaint by Willard P. Barnes that on the 3rd day of September, 1955 at the Township of Stockbridge, County of Ingham, Neely Buchanan did then and there murder one Myra Herrick in violation of Section 316 of Act 328, Public Acts of 1931, Compiled Laws of 1948, Section 750.316, Michigan Statutes Annotated Section 28.548. In other words, you are charged with murdering the lady out there on the 3rd of September, 1955.

Now at this time you can ask for an examination in my court or you can take your choice to take this directly into circuit court. Do you understand that?

THE RESPONDENT: Yes, sir.

THE COURT: You have been through this procedure at previous occasions, have you, so you understand what it is?

THE RESPONDENT: Yes, sir.

THE COURT: Now which do you wish to do? Do you wish to have an examination or do you wish to waive that examination?

THE RESPONDENT: I wish to waive examination.

THE COURT: And take it directly into circuit court?

PAUL SKARSTAD
OFFICIAL COURT REPORTER
THIRTIETH JUDICIAL CIRCUIT

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THE RESPONDENT: Yes, sir.

THE COURT: I also have the complaint of Willard P. Barnes that on the 3rd day of September, 1955 at the Township of Stockbridge, Ingham County, one Neely Buchanan did then and there murder one Howard Herrick in violation of Section 316 of Act 328, Public Acts of 1931, compiled laws of 1948, Section 750.316, Michigan Statutes Annotated Section 28.548. That is the charge for the murder of Howard Herrick?

THE RESPONDENT: Yes, sir.

THE COURT: That was the man. Out in Stockbridge Township, the 3rd day of September, 1955. The same charge. Now what do you wish to do in respect to that charge?

THE RESPONDENT: Waive the examination.

THE COURT: Do you wish to waive examination?

THE RESPONDENT: Yes, sir.

THE COURT: Well, it is the order of this court that on each of these charges you shall be held without bail to appear in the Circuit Court for the County of Ingham on the 18th day of October, 1956, at 1:30 p. m. at the court room in the City of Lansing.

MR. CHAMBERLAIN: May it please your honor, we would like to have that at 9:30 a. m. In the morning.

THE COURT: At 9:30 a. m. In the morning?

MR. CHAMBERLAIN: Yes, sir.

THE COURT: Strike that 1:30 and make it 9:30 a. m. on

PAUL SKARSTAD
OFFICIAL COURT REPORTER
THIRTIETH JUDICIAL CIRCUIT

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that date. That is tomorrow morning at 9:30 in the City of
Lansing in circuit court for arraignment. You are held without
bail. Do you understand that?


THE RESPONDENT: Yes, sir.

THE COURT: This session is now adjourned.

STATE OF MICHIGAN)
) SS.
COUNTY OF INGHAM)

I, Paul Skarstad, an official court reporter for the
30th Judicial Circuit, do hereby certify that I reported the
proceedings had upon the Arraignment in the case of the
People v. Nealy Buchanan, before the Hon. Roy W. Adams,
Justice of the Peace for the City of Mason, at Mason, Michigan
on October 18th, 1956; and that the annexed and foregoing
typewritten transcript is a true, complete and accurate
transcript of said proceedings.

Dated this 25th day of October, 1956.



Paul Skarstad,
311 City Hall,
Lansing, Mich.

PAUL SKARSTAD
Official Court Reporter

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ld

NO. 84-501

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

BARRY MINTZES,

Petitioner,

-vs-

NEALY BUCHANON,

Respondent.

On Writ of Certiorari To The United States
Court of Appeals for the Sixth Circuit

CERTIFICATE OF SERVICE

FRANK D. EAMAN, states that on the 25th day of OCTOBER,
1984, he served a true copy of: BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO PROCEED IN FORMA
PAUPERIS

on:

FRANK J. KELLY, ATTORNEY GENERAL
LOUIS J. CARUSO, Solicitor General
ERIC J. EGGAN, Assistant Attorney General

at: Appellate Division
Law Building, 7th Floor
Lansing, MI 48913

by placing said true copy in a envelope, addressed to the above
named, and depositing the same in the United States Mail, with
postage thereon fully paid.



FRANK D. EAMAN
Attorney for Respondent

(Admission to the Bar
of this Court pending)